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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. WILLIAM E. MORGAN, Petitioner.	2 CA-CR 2008-0267-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR-20063489 and CR-20063975 (Consolidated)

Honorable Gus Aragón, Judge

REVIEW GRANTED; RELIEF DENIED

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E C K E R S T R O M, Presiding Judge.

¶1 Petitioner William Morgan was charged in two indictments with multiple offenses, including drive-by shooting, aggravated assault with a deadly weapon or dangerous instrument, aggravated assault causing serious physical injury, and seven counts of endangerment. Pursuant to a plea agreement, he pled guilty to one count each of drive-by shooting, aggravated assault with a deadly weapon, and endangerment. The plea agreement contained no provision regarding whether the sentences were to be served concurrently or consecutively. The trial court imposed consecutive, presumptive terms of imprisonment totaling 20.25 years for the three convictions. Morgan filed a petition for post-conviction relief, claiming his sentence for drive-by shooting "could not legally be ordered served consecutively" to the sentences for his other offenses. This petition for review follows the trial court's summary dismissal of the petition.

¶2 As he did below, Morgan argues on review that constitutional protections against double jeopardy, A.R.S. § 13-116, and *State v. Gordon*, 161 Ariz. 308, 778 P.2d 1204 (1989), "require that offenses resulting from the same act be sentenced concurrently." He claims his conduct supporting all of his convictions constituted a single act and, although he concedes consecutive sentences were appropriate for his endangerment and aggravated assault convictions, because those convictions involved two different victims, *see State v. Bennin*, 107 Ariz. 1, 3, 480 P.2d 651, 653 (1971), he contends his sentence for drive-by shooting could not be consecutive to either of those offenses.

¶3 "The Double Jeopardy clauses of the United States and Arizona Constitutions protect criminal defendants from multiple convictions and punishments for the same offense." *State v. Ortega*, No. 2 CA-CR 2007-0403, ¶ 9, 2008 WL 4571814 (Ariz. Ct. App. Oct. 14, 2008); *see also* U.S. Const. amend. V; Ariz. Const., art. II, § 10. "Distinct statutory provisions constitute the same offense if they are comprised of the same elements." *State v. Siddle*, 202 Ariz. 512, ¶ 10, 47 P.3d 1150, 1154 (App. 2002). If statutory provisions require proof of one or more different facts, they not the same offense. *Id.*, *citing Brown v. Ohio*, 432 U.S. 161, 165 (1977), and *Blockburger v. United States*, 284 U.S. 299, 304 (1932). Morgan does not contest the trial court's finding that the offenses at issue here required proof of different facts.

¶4 Section 13-116, the statutory prohibition against double punishment, provides: "An act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent." A trial court cannot impose consecutive sentences "when the defendant's conduct is a 'single act.'" *State v. Hampton*, 213 Ariz. 167, ¶ 64, 140 P.3d 950, 965 (2006), *quoting Gordon*, 161 Ariz. at 315, 778 P.2d at 1211. "Unlike our double jeopardy analysis, which focuses on the elements of distinct statutory offenses to determine if they are the same offense, our analysis under § 13-116 focuses on the 'facts of the transaction' to determine if the defendant committed a single act." *Siddle*, 202 Ariz. 512, ¶ 17, 47 P.3d at 1155, *quoting Gordon*, 161 Ariz. at 313 n.5, 778 P.2d at 1209 n.5. In order to determine whether conduct constitutes a

single act for purposes of § 13-116, we apply the following test as set forth by our supreme court in *Gordon*.

> "[W]e will . . . judge a defendant's eligibility for consecutive sentences by considering the facts of each crime separately, subtracting from the factual transaction the evidence necessary to convict on the ultimate charge—the one that is at the essence of the factual nexus and that will often be the most serious of the charges. If the remaining evidence satisfies the elements of the other crime, then consecutive sentences may be permissible under A.R.S. § 13-116. In applying this analytical framework, however, we will then consider whether, given the entire 'transaction,' it was factually impossible to commit the ultimate crime without also committing the secondary crime. If so, then the likelihood will increase that the defendant committed a single act under A.R.S. § 13-116. We will then consider whether the defendant's conduct in committing the lesser crime caused the victim to suffer an additional risk of harm beyond that inherent in the ultimate crime. If so, then ordinarily the court should find that the defendant committed multiple acts and should receive consecutive sentences."

State v. Anderson, 210 Ariz. 327, ¶ 140, 111 P.3d 369, 400 (2005), *quoting Gordon*, 161 Ariz. at 315, 778 P.2d at 1211 (alterations in *Anderson*).

¶5 We agree with Morgan's contention that, under the facts of this case, drive-by shooting was the "ultimate charge" for purposes of this analysis. Morgan argues that, "[b]ased on the facts adduced at the change of plea proceeding, it was a factual impossibility" for him to have committed the aggravated assault and endangerment "without also committing the drive-by shooting." He argues that "[t]he facts necessary to establish the drive-by shooting were that [he] and his codefendant Ramos, the vehicle's driver, drove past a U[niversity] of A[rizona] fraternity house and fired multiple shots with a handgun into a

crowd." He concludes, therefore, that he could not have committed the ultimate offense of drive-by shooting without also committing the aggravated assault and endangerment. We disagree.

¶6 Morgan indeed admitted he had fired at least three shots from a gun out the window of a vehicle at a crowd of people. The aggravated assault victim was hit by one of them; the man standing closest to that victim was the victim of the endangerment charge. But only one shot was necessary to prove Morgan had committed the drive-by shooting, and the shot need not have injured anyone. *See* A.R.S. § 13-1209(A) ("A person commits drive by shooting by intentionally discharging a weapon from a motor vehicle at a person, another occupied motor vehicle or an occupied structure."); *State v. Siner*, 205 Ariz. 301, ¶ 12, 69 P.3d 1022, 1024-25 (App. 2003). The evidence remaining after subtracting one of the non-injuring shots Morgan admitted having fired leaves sufficient evidence to support both his aggravated assault and endangerment convictions. Moreover, given only a single shot injured the aggravated assault victim, also endangering the second victim, it was factually possible for Morgan to have committed the drive-by shooting without also committing the aggravated assault and endangerment. *Cf. State v. Miranda*, 198 Ariz. 426, ¶ 17, 10 P.3d 1213, 1217 (App. 2000) (upholding consecutive sentences for three counts of disorderly conduct where each of three shots fired by defendant "constituted a separate act"). Having concluded, therefore, that Morgan's conduct constituted multiple acts under the first two factors identified in *Gordon*, we arguably need not address the third. *See Gordon*, 161 Ariz.

at 315, 778 P.2d at 1211 (explaining that, if analysis of first and second factors indicates single act under § 13-116, court "will then consider" third factor). *But see State v. Roseberry*, 210 Ariz. 360, ¶¶ 58-62, 111 P.3d 402, 412-13 (2005) (reaching third part of *Gordon* analysis without discussion even though first two parts of test supported consecutive sentences). But Morgan's actions in firing multiple shots, one of which actually struck one victim and nearly missed another, did increase the risk of harm inherent in a drive-by shooting.

¶7 The trial court did not err by imposing consecutive sentences in this case. Therefore, the court's denial of post-conviction relief on this ground did not constitute an abuse of discretion, *see State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990), and we deny relief.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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JOSEPH W. HOWARD, Judge